

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 1189 OF 1995

A N D

SPECIAL CIVIL APPLICATION NO. 1190 OF 1995

For Approval of Signature :

Hon'ble MR. JUSTICE B.C. PATEL and Sd/-

MR. JUSTICE S.M. SONI Sd/-

1. Whether Reporters of Local Papers may be allowed

to see the judgments ? Yes

2. To be referred to the Report or not ? Yes

3. Whether Their Lordships wish to see the fair copy

of the judgment ? No

4. Whether this case involves a substantial question

of law as to the interpretation of the
Constitution of India, 1950 or any Order made
thereunder ? No

5. Whether it is to be circulated to the Civil

Judge ? No

Appearance :

Mr J P Shah, Advocate for the petitioner

Mr Mihir Thakore, Senior Advocate for Mr M R Bhatt of M/s
R P Bhatt & Co. for the respondent.

Coram : B.C. Patel & S.M. Soni, JJ.

Date of Decision : 26/06/1996

Common Oral Judgment : (Per B.C. Patel, J.)

1. The petitioner, a Public Limited Company
(hereinafter referred to as "the Company" or "the
Assessee"), by filing these petitions under Article 226
of the Constitution of India, has prayed for issuance of
a writ of certiorari or any other appropriate writ, order
or direction to quash and set aside the notices at
Annexure- "D" dated 3.2.1995 in both the petitions issued
under Sec. 148 of the Income Tax Act, 1961 (hereinafter
referred to as "the Act").

2. In Special Civil Application No. 1190 of 1995 for the Assessment Year 1993-94, notice vide Annexure "D" dated 3.2.1995 came to be issued by the Assessing Officer under Sec. 148 of the Act. The notice is issued on identical facts which are referred in Special Civil Application No. 1189 of 1995. Except the change in figures, we find no changes. At the request of learned counsels, we have heard both the matters together and have disposed of by a common judgment.

3. Short facts of the case as it emerges from Special Civil Application No. 1189 of 1995 are as under:

The Company submitted the computation of income for the Assessment Year 1992-93 vide Annexure - "A" and claimed deduction of various items including (i) Rs.2,96,04,082/- being the surplus on cancellation of forward contracts and (ii) Rs.10,06,50,438/- being Excise Duty paid on yarn, yarn used in cloth and engineering component included in closing stock. Assessing Officer, during the course of assessment raised questions regarding aforesaid items and the Company was called upon to explain. The Company, by its letter dated 8th March, 1994, explained in detail as to how the amount was received. It was pointed out that the Company has entered into forward exchange contracts and on cancellation of the same, a sum of Rs. 8,54,42,806/- was received. Out of the aforesaid amount, Rs.4,68,36,094/- came to be credited to Plant & Machinery Account, Rs.90,02,630/- came to be credited to Roll over Premium Expense Account and Rs. 2,96,04,082/- came to be credited to Profit & Loss Account. It was pointed out that the Company being a manufacturer of textile fabrics, imports various machineries and equipments against loans in foreign currency. Against the instalment of loans payable and interest payable on such loans, the petitioner Company entered into contracts covering the foreign exchange contracts to guard against the fluctuation in the rate of foreign currency. In view of the policy, the Reserve Bank of India permits the Companies to enter into forward contracts for the foreign exchange to be drawn by the Companies with a view to limit or regulate exposure of the Indian Companies. It was specifically pointed out that the Company is not engaged in financing business or is not dealing in foreign exchange.

With regard to Excise Duty, it was pointed out

that the petitioner Company has claimed deduction under Sec. 43 B of the Act in respect of Excise Duty with respect to closing stock of cloth and engineering components on the ground of payment of Excise Duty amounting to Rs.10,06,50,438/- . It was pointed out that the petitioner Company has inventory of yarn of Rs.20,73,76,667/-, cloth of Rs.39,77,47,368/- and of engineering components of Rs. 2,33,34,704/- as on 31st March, 1992. This inventory includes Excise Duty paid by the Company on yarn purchased by the Company and lying in the closing stock in the heading of yarn of cloth and engineering components respectively. It was pointed out that the Excise Duty paid on purchase of raw material would make the Company entitled to get the deduction under the provisions of Sec. 43 B of the Act.

4. Mr P K Kedia, the then Deputy Commissioner of Income-tax (Asstt.), Special Range-I, Surat, on 24.3.1994, considering the submissions assessed the Company assessee. In para 4.5 of the Assessment Order, the Assessing Officer has discussed in detail about the amount received by the assessee on cancellation of forward exchange contract. It also clearly indicates that the Assessing Officer has considered the law laid down by the Apex Court in the case of Canara Bank and in the case of State Bank of India (63 ITR 328 and 157 ITR 67 respectively). The Assessing Officer also considered the decision rendered by the Apex Court in the case of Vania Silk Mills Ltd. (191 ITR 647). The Assessee contended that the cancellation of forward exchange contracts does not involve "transfer" of a capital asset within the meaning of Sec. 2 (47) of the Act. The Assessee also contended that surplus arising on cancellation of the forward exchange contracts in the case of a manufacturing Company like the Assessee Company would not be liable to pay tax on such surplus. The Assessors placed reliance on the decisions of the Apex Court in the case of CIT vs. Telco (60 ITR 405) and Universal Radiators (201 ITR 800).

5. In para 4.8 of the Assessment Order, the Assessing Officer has, after considering the submissions made by the Assessee and having gone through the decisions, held that the Assessee is not a banking Company and is not engaged in the business of purchasing foreign exchange or dealing in the same by entering into forward exchange contracts. After following the decisions of the Apex Court, Assessing Officer held that there is no transfer of a capital asset on cancellation of the forward exchange contracts.

6. Even with regard to the claim of the Assessee for deduction of Excise Duty, in para 4.10 of the Assessment Order, the Assessing Officer has considered the decisions pointed out by the Assessee, and particularly, the case of Lakhanpal National Limited reported in 162 ITR 240 (Gujarat High Court) and after detailed discussion, has held that there is no difficulty in accepting the contention raised by the Assessee. Thus, after considering the pros and cons of the matter and considering the various decisions cited before him, the Assessing Officer passed an order of assessment.

7. It appears that the new incumbent in place of Deputy Commissioner of Income-tax (Asstt.), Special Range-I, Surat issued a notice under Sec. 148 of the Act. M/s Shah and Thakore, learned counsels have taken us through the record and the decisions referred to hereinabove and some other decisions for which reference need not to be made. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any Assessment Year, he may, subject to provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of proceedings under this Section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the Assessment Year concerned. The Assessing Officer is required to record his reasons in every case before issuing a notice and accordingly, in the instant case, reasons recorded by the Assessing Officer are placed on record. There is nothing to indicate that there was failure on the part of the Assessee to make a return of its income and to disclose fully and truly all the material facts necessary for his assessment. In the reasons, there is nothing to indicate that the Assessing Officer in consequence of information in his possession has reason to believe that the income has escaped assessment. It is well known that the Assessing Officer is entitled to act on information received after the original assessment. Such information may have been gathered from the record of assessment itself. The Assessing Officer cannot take any action under this section merely because he happens to change his opinion or to hold an opinion different from that of his predecessor, on the same set of facts. From the Assessment Order, it clearly appears that the Assessing Officer applied his mind to the computation of income and, therefore, in a case like this, it would not be open for the Assessing Officer to issue a notice u/s. 148 of the Act. The reasons which are placed on record are

perused by us. Learned counsel for Revenue could not point out anything from the said reasons that after the order of assessment by the Assessing Officer considering all the decisions, any further information has been received by the Assessing Officer which would enable him to exercise the powers. Reading the reasons recorded by the Assessing Officer, it clearly transpires that there is no new information but there is a change of opinion. In the operative part of the reasons, it is recorded as under :

"On scrutiny of records, it was found that the assessee had made incorrect claims and the same were allowed. Because of these incorrect claims, it is concluded that the income chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose income truly and fully."

If it would have been the case that the facts were not disclosed fully and truly, then it can be said that by not disclosing the facts claims were made and were allowed. But the facts are mentioned by the Assessee and with regard to the subject matter, we find detailed discussion in the Assessment Order. The Assessment Order clearly indicates that the Assessee was required to address with regard to the subject matter before the assessment and the Assessing Officer was satisfied about factual and legal aspect and following the judgments of the Apex Court and of this Court assessed the Assessee. In reply, respondent has not dealt with the specific contention raised by the Assessee that it has fully and truly disclosed all the relevant facts. Even before this Court it was not suggested by the learned counsel for Revenue that relevant facts for assessment have been concealed or have not been fully and truly disclosed.

8. In our opinion, it is a mere change of opinion and that would not amount to the escapement of income. On this ground, these petitions are required to be allowed and are hereby allowed. Notices issued under Sec. 148 Annexures - "D" dated 3.2.1995 in both the Special Civil Applications are hereby quashed and set aside. Rule made absolute accordingly with no order as to costs.

ssm./

